

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 31**

CALIFORNIA FACULTY ASSN.

Employer

and

Case 31-UC-287

**CALIFORNIA HIGHER EDUCATION STAFF UNION
(CHESU)^{1/}**

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, herein the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.

^{1/} The name of the Petitioner appears as corrected at the hearing.

4. The Petitioner seeks to clarify the existing unit of employees at the Employer's Los Angeles and Sacramento facilities by adding to it one administrative support staff position at the Los Angeles facility. The Employer contends that the employee currently employed in this position 1) is a confidential employee, and 2) on several occasions has been designated as a supervisor and has exercised supervisory authority, and, thus, should not be added to the existing bargaining unit under this UC petition.

The Petitioner and Employer are currently signatory to a collective bargaining agreement, effective through August 31, 1999,^{2/} encompassing a bargaining unit "composed of part-time and full-time support staff, excluding occasional (no more than sixty days per year), supervisory/confidential, chapter employees, college interns, professional and management employees," herein called the Unit. At the time of the hearing there were four employees in the Unit in the Employer's Los Angeles facility.^{3/} In addition, there are three supervisory/confidential employees, three managers, and 5-6 field staff who are not in the bargaining unit.

One of the unit employees, Vicky Ustaris, was hired as a secretary in September 1986. She worked as a "secretary/accounting" in the Business Office from December 1992, reporting to the Office Supervisor, until she began a disability leave of absence in November 1997. Ms. Ustaris' duties included attending Board of Directors meetings 10-12 times per year, working with an auditor every year at the end of the year, and preparing an annual report for the Treasurer for the State Labor Board. On one occasion she attended and took minutes at a delegate assembly^{4/} meeting in 1995 or 1996. Ms. Ustaris had access to all financial records as well as to employees' expense vouchers.

^{2/} Article 25 of the Agreement states that the Agreement "shall be effective upon ratification, and shall continue in effect until August 31, 1999." There is, however, no indication in the Agreement of when ratification took place.

^{3/} One of these employees may have resigned, effective September 1, 1999; at the time of the Hearing the Employer had not decided whether to replace her.

^{4/} The delegate assembly is a semiannual meeting of elected members of the Employer that, inter alia, determines policy and bargaining positions for the Employer.

Ms. Ustaris occasionally requested the General Manager to hire a temporary part-time assistant to help her when her work got busy, and on those occasions she trained and oversaw the work of the assistant.

Ms. Ustaris did not maintain or have access to employee personnel files, which are located in the President's office. She did not take minutes at Board of Directors meetings, although she did keep copies of the minutes in a file for her supervisor and she was able to read them. She did not attend executive sessions at Board of Directors meetings, could not read the minutes taken during these executive sessions, and did not attend Personnel Committee meetings.^{5/} She never participated in the resolution of employee grievances, nor did she provide information to the Employer to assist in their resolution.^{6/} She neither served as a member of the Employer's Negotiating Committee nor was privy to the Employer's bargaining strategies in advance of the negotiating sessions which she attended on behalf of the Petitioner.

Since Ms. Ustaris' return to work after her disability,^{7/} she has been working in a "work area" in the reception area of the office. She now reports to the Business Manager.

In May 1996, Alison Beltran was hired as an "Administrative Assistant, Governance," reporting to the General Manager, the Business Manager, and to the President, as well as to provide back up to the Business Office.^{8/} Ms. Beltran's offer of employment letter, dated May 20, 1996, states that she is a "confidential employee." One of the specific duties listed in an attachment to this letter is to "Take minutes at Board of Directors and Assembly meetings...." She testified that this particular duty has been a regular part of her responsibilities since her employment began. She also attends and takes minutes at executive

^{5/} I note that at this point in the testimony, some of Ms. Ustaris' testimony appears to have been deleted on pages 30-31 of the transcript.

^{6/} On one occasion Ms. Ustaris provided some clerical assistance by providing the dates of service and salaries of employees involved in a grievance.

^{7/} The date of Ms. Ustaris' return to work is not in the record.

^{8/} At the time of the Hearing the position of General Manager was unfilled.

sessions of Board of Directors meetings, during which no other staff or guests are allowed.^{9/} Items of discussion during these executive sessions include personnel issues such as disciplinary action, disposition of employee grievances, labor relations matters, and bargaining strategy to be used by the Employer with the Petitioner. The executive sessions are recorded on audio tapes; Ms. Beltran is the custodian of these tapes.^{10/} Ms. Beltran was transferred to the Business Office in about November 1997, and has continued to attend and take minutes at Board of Directors meetings and executive sessions.

Additional duties that Ms. Beltran has performed include assisting the General Manager in the resolution of employee grievances by giving advice to the General Manager when asked.^{11/} The General Manager has also asked for Ms. Beltran's opinion regarding general personnel policies and procedures in the office, including a desk audit, which she was then assigned to complete. The General Manager has asked for Ms. Beltran's opinion regarding collective bargaining matters pertaining to unit employees, including their workload, down time, and ability. Providing input to the General Manager regarding performance evaluations of the support staff has been a routine facet of her job. Although Ms. Beltran has typed up bargaining proposals for the Employer, she has not participated in the actual collective bargaining with the Petitioner nor has she made any decisions regarding collective bargaining.^{12/} In addition, Ms. Beltran has typed up the General Manager's notes regarding a personnel matter into a memo to be sent to the Personnel Committee by e-mail; this memo included information that the employee in question did not have. She also has sent the

^{9/} Ms. Beltran estimated that she has attended about two dozen executive sessions. She has been asked to leave only one executive session since she was hired, prior to the hearing date.

^{10/} Ms. Beltran is the only employee with access to the tapes; a Board member may request them from her.

^{11/} For example, during the investigation of a unit employee's grievance, Ms. Beltran investigated what days the employee worked, who signed off on her hours worked, and what work she was doing, and made some recommendations to the General Manager prior to a settlement agreement being reached between the Employer and the Petitioner. Ms. Beltran did not negotiate for, or sign, the settlement agreement.

^{12/} Ms. Beltran was present at the executive session of the Board of Directors meeting in June 1998 when the Petitioner's offer of an extension to the current collective bargaining agreement was discussed.

General Manager's notes of an Officers' Conference Call to the Officers by e-mail; these notes included information concerning the Personnel Committee, which was not available to anyone other than the officers and Ms. Beltran. In addition, Ms. Beltran has served as a communication link between the General Manager and the Employer's legal counsel by relaying messages concerning labor relations matters.

Ms. Beltran is the custodian of the employee personnel files.^{13/} As such, she maintains the files and regularly updates them by entering change notices regarding status or salary. She also enters performance evaluations, letters of praise, and letters of complaint written by other individuals about the employees.^{14/} She records each insert in the personnel files. She also has access to confidential information about payroll liens, such as wage garnishments against employees' paychecks for failure to pay car registrations or child custody.

Ms. Beltran has her own office in back of the reception area. Since September 1998^{15/} she has reported to the Business Manager, who currently handles labor relations matters involving unit employees, in the absence of a General Manager.

The primary question is whether Ms. Beltran is a confidential employee. "Confidential employees" are defined as employees who assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies with regard to labor relations, or regularly substitute for employees having such duties; under Board law, they are excluded from the bargaining unit. *Ladish Co.*, 178 NLRB 90 (1969); *Chrysler Corp.*, 173 NLRB 1046 (1969); *Eastern Camera Corp.*, 140 NLRB 569, 574 (1963); *B.F. Goodrich Co.*, 115 NLRB 722, 724 (1956); *Hampton Roads Maritime Assn.*, 178 NLRB 263 (1969). Under the "labor nexus test," the person whom a "confidential employee" assists must formulate, determine and effectuate management policies with

^{13/} The Business Manager is the custodian of the key to the personnel files, and Ms. Beltran is the only employee allowed to obtain the key from the Business Manager.

^{14/} She does this on her own or with direction.

^{15/} The current Business Manager was hired in September 1998.

regard to labor relations. *B.F. Goodrich*, 115 NLRB at 724, *aff'd*, *NLRB v. Hendricks County Electric Corp.*, 454 U.S. 170, n.19 (1981); *Weyerhaeuser Co.*, 173 NLRB 1170 (1969).

Prior to her return to work, Ms. Ustaris reported to a supervisor; in contrast, Ms. Beltran reports to the Business Manager, and prior to September 1998 Ms. Beltran reported to the General Manager and President. In the absence of the General Manager, the Business Manager handles labor relations matters involving unit employees at the top management level, and Ms. Beltran assists him in that capacity.

The Board dealt with the issue of the confidential status of secretaries to the employer's negotiating team and management officials responsible for formulating the employer's contract proposals in *Firestone Synthetic Latex Co.*, 201 NLRB 347 (1973), where it found them to be confidential employees because they assisted in the preparation of and/or had access to confidential labor relations information such as the employer's data in preparation for contract negotiations, minutes of negotiating sessions, and grievance investigation reports. See also *National Cash Register Co.*, 168 NLRB 910, 912-13 (1968); and *Bakersfield Californian*, 316 NLRB 1211 (1995).

Ms. Beltran was hired as a confidential employee with "access to personnel files, information being used to evaluate other employees, and information used by management in negotiations with its employees who are represented by the staff union." No evidence established that Ms. Ustaris either was hired or acted as a confidential employee.

While Ms. Beltran regularly maintains and updates personnel files, Ms. Ustaris never had access to personnel files. An employee's access to personnel files and the fact that the employee can bring information to the attention of management, which may ultimately lead to disciplinary action by management, is, however, not enough to qualify an employee as confidential. *RCA Communications*, 154 NLRB 34, 37 (1965); *Ladish Co.*, 178 NLRB 90 (1969); and *Hampton Roads Maritime Assn.*, 178 NLRB 263 (1969).

Ms. Beltran has several important duties which Ms. Ustaris did not have. Ms. Ustaris did not take minutes at Board of Directors meetings as does Ms. Beltran. Ms. Ustaris also did not attend or take minutes at executive sessions at Board of Directors meetings as does Ms. Beltran. It is during these executive sessions that confidential labor relations information concerning bargaining strategy, grievance dispositions, and disciplinary actions are discussed. In addition, Ms. Beltran regularly attends and takes minutes at delegate assembly meetings, during which policy and bargaining positions are determined for negotiations, whereas Ms. Ustaris attended and took minutes at only one of these meetings. Although neither Ms. Ustaris nor Ms. Beltran has attended Personnel Committee meetings, Ms. Beltran has typed up the General Manager's notes of a Personnel Committee meeting, thus making her privy to confidential information about the employee in question. Ms. Beltran has also seen and distributed the General Manager's notes of an officer's conference call and has served as a communication link between the General Manager and the Employer's legal counsel regarding labor relations matters, neither of which Ms. Ustaris did.

The Board has held that an employee who has access to confidential matters dealing with contract negotiations is a confidential employee. *Kieckhefer Container Co.*, 118 NLRB 950, 953 (1957). A clerk who prepares statistical data for use by an employer during contract negotiations, however, is not confidential because the clerk cannot determine from the data prepared what policy proposals may result. *American Radiator Corp.*, 119 NLRB 1715, 1720-21 (1958). Neither Ms. Ustaris or Ms. Beltran served on the Employer's Negotiating Committee. Ms. Beltran, however, has typed bargaining proposals for the Employer, which Ms. Ustaris has not. With regard to employee grievances, in addition to conducting research concerning grievances, Ms. Beltran has been asked by the General Manager to give her advice regarding the disposition of grievances, which she gave, prior to their settlement. Ms. Ustaris, on the other hand, on one occasion provided only clerical assistance concerning a grievance. Ms. Beltran also has been asked by the General Manager to give her recom-

mendations regarding general personnel policies and procedures in the office, as well as collective bargaining matters pertaining to unit employees, including their workload, ability, and performance, which she gave. The evidence, however, did not show that Ms. Ustaris was ever solicited for her recommendations.

Ms. Ustaris had access to all financial records and expense vouchers, which are not confidential. Under Board law, employees who handle material dealing only with the financial matters of the employer are not considered confidential. *Dinkler-St. Charles Hotel*, 124 NLRB 1302 (1959); *Brodart, Inc.*, 257 NLRB 380, 384 n.1 (1981). Ms. Beltran, on the other hand, has access to confidential financial information concerning wage garnishments against employees. No evidence established that Ms. Ustaris had access to such information.

Finally, it is noted that Ms. Beltran has her own office, and Ms. Ustaris does not.

Based on the factors discussed above, particularly focusing on Ms. Beltran's access to confidential labor relations information to which other employees (including Ms. Ustaris) do not have access, I find and conclude that Ms. Beltran is a confidential employee within the meaning of the Act, and, therefore, she should not become part of the bargaining unit.

Since the most current collective bargaining agreement between the Petitioner and Employer excludes the category of "supervisory/confidential" employees from the bargaining unit, and since I find that Ms. Beltran is a confidential employee, I do not find it necessary to rule on the issue of Ms. Beltran's asserted supervisory authority.

In conclusion, for the reasons set forth above, and on the basis of the record as a whole, I find and conclude that the existing unit should not be clarified to include the position in the Business office currently held by Alison

Beltran at the Employer's Los Angeles facility. Accordingly, I shall dismiss the petition.^{16/}

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.^{17/}

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C., by September 27, 1999.

Dated at Los Angeles, California, this 13th day of September, 1999.

/s/ Byron B. Kohn

Byron B. Kohn, Acting Regional Director
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^{16/} I note that the Petitioner sent me a letter dated August 31, 1999, which I shall treat as a motion to reopen the hearing. On two separate and independent bases, I do hereby dismiss the Petitioner's motion. First, this *ex parte* motion appears to breach Section 102.65(a) of the Board's Rules and Regulations since no service on the Respondent is reflected. See *Air Control Products, Inc.*, 132 NLRB 114, 115 n.1 (1961). Second, even if, *arguendo*, Ms. Beltran was excluded from an additional executive session, the decision would not change in light of all the other evidence. See note 9.

^{17/} During the Hearing the Employer made a motion to dismiss the petition because the Petitioner had failed to sustain its burden of proof in establishing that the disputed classification was not confidential or supervisory. The Hearing Officer advised that the Regional Director would rule on the Employer's motion in the Decision and Order. Based on the totality of the record, I do hereby grant the Employer's motion to dismiss the petition.